SUPREME COURT, U.S.
FILED

061019 JAN 23 2007

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No. ___

IN THE

Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION AND
UNITED AIR LINES, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where Congress directed that a court, not the Pension Benefit Guaranty Corporation (the "PBGC") establish the termination date of a pension plan, which the PBGC seeks to involuntarily terminate under 29 U.S.C. § 1342(c), whether the court below ignored the plain meaning of the involuntary termination provisions by (a) determining the unreasonable increase in the PBGC's liability and (b) failing to independently establish a termination date.

2. Whether a bankruptcy court order conclusively deciding that a debtor must continue contractually required payments constituted a final order for which an appeal not timely taken was forfeited.

LIST OF PARTIES TO THE PROCEEDING

The Air Line Pilots Association, International ("ALPA") is an unincorporated labor organization representing pilots in the commercial airline industry. It was an intervenor-defendant in *PBGC v. United Air Lines, Inc.*, Adv. Proc. No. 05-481 (Bankr. N. D. Ill.) (the "Pension Plan Termination Case"), an appellant and cross-appellee in the court of appeals, and a petitioner in this Court; ALPA was also the movant in the separate contested proceedings in the bankruptcy court regarding the payment of October, 2005 supplemental pension benefits (the "Supplemental Benefits Case"), and, with respect to that case, was an appellee in the district court and the court of appeals, and is the petitioner in this Court.

The United Retired Pilots Benefit Protection Association ("URPBPA") is an Illinois not-for-profit corporation representing certain retired pilots of United Air Lines, Inc. The individual parties are retired United pilots who serve on URPBPA's Board of Directors. URPBPA was also an intervenor-defendant, appellant and cross-appellee in the Pension Plan Termination Case, and a movant and appellee in the Supplemental Benefits Case. URPBPA is the petitioner in a separate petition for a writ of certiorari regarding the Pension Plan Termination Case and the Supplemental Benefits Case.

The PBGC is a wholly-owned United States government corporation established under 29 U.S.C. § 1302(a) to administer the defined benefit pension plan insurance program established by Title IV of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). The PBGC was the plaintiff in the Pension Plan Termination Case, the appellee and cross-appellant in the court of appeals, and is a respondent in this Court.

United Air Lines, Inc. and twenty-seven related and affiliated entities as debtors and debtors in possession* were respondents in the Supplemental Benefits Case in the bankruptcy court and appellants in the district court. Reorganized United Air Lines, Inc. was appellant in the court of appeals and is a respondent in this Court. United Air Lines, Inc., as administrator of the United Air Lines Pilots Defined Benefit Pension Plan (the "Pilot Plan"), was a defendant in the Pension Plan Termination Case, an appellee in the court of appeals, and is the respondent in this Court. The foregoing entities, as debtor, as the reorganized entity, and as administrator of the Pilot Plan, are hereinafter referred to collectively as "United."

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* The debtor entitites were: UAL Corporation, UAL Loyalty Services, LLC, Ameniti Travel Clubs, Inc., Mileage Plus Holdings, Inc., Mileage Plus Marketing, Inc., MyPoints.com, Inc., MyPoints Offline Services, Inc., Cybergold, Inc., iTarget.com, UAL Company Services, Inc., UAL Benefits Management, Inc., United BizJet Holdings, Inc., BizJet Charter, Inc., BizJet Fractional, Inc., BizJet Services, Inc., United Airlines, Inc., Kion Leasing, Inc., Premier Meeting and Travel Services, Inc., United Aviation Fuels Corporation, United Cogen, Inc., Mileage Plus, Inc., United GHS, Inc., United Worldwide Corporation, United Vacations, Inc. UAL Corporation is the publicly traded parent company for United Air Lines, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Air Line Pilots Association, International petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in *In re UAL Corporation (Pilots' Pension Plan Termination)*, 468 F.3d 444 (7th Cir. 2006).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *In re UAL Corp.*, 468 F.3d 444 (7th Cir. 2006). App. A, 1a-17a. The November 13, 2006 order of the court of appeals denying ALPA's petition for rehearing is unreported. App. O, 137a.

The court of appeals' opinion consolidated the appeals of separate cases, the "Pension Plan Termination Case" and the "Supplemental Benefits Case." The decision of the court of

appeals in the Pension Plan Termination Case affirmed a June 13, 2006 decision and order of the Honorable Joan H. Lefkow of the United States District Court for the Northern District of Illinois, reported at *PBGC v. United Air Lines, Inc.*, 436 F.Supp.2d 909 (N.D. Ill. 2006) (the "Pension Plan Termination Order"). App. B, 18a, App. C, 19a-45a. Judge Lefkow's decision adopted, as modified, the unreported Proposed Findings of Fact and Conclusions of Law issued by the Honorable Eugene R. Wedoff of the United States Bankruptcy Court for the Northern District of Illinois. App. D, 46a-75a. The bankruptcy court initially issued the proposed findings and conclusions on October 26, 2005 as an Amended Memorandum of Decision on Motion for Summary Judgment, reported at *In re UAL Corp.*, 333 B.R. 802 (Bankr. N.D. Ill. 2005), App. I, 100a-117a, and separate Memorandum of Decision, reported at 332 B.R. 858 (Bankr. N.D. Ill. 2005), App. H, 90a-99a. On February 2, 2006, the Honorable John W. Darrah of the United States District Court for the Northern District of Illinois reversed and remanded these rulings to be reissued as the proposed findings and conclusions. The February 2, 2006 Memorandum Opinion and Order are unreported. App. E, 76a, App. F, 77a-87a.

The court of appeals' Supplemental Benefits Case decision reversed the unreported order entered on February 23, 2006 by Judge Darrah. App. K, 121a. Judge Darrah's order dismissed as unripe the appeal of an unreported October 6, 2005 order entered by the bankruptcy court (the "Supplemental Benefits Order"). App. L, 122a-130a.

JURISDICTION

The Court of Appeals for the Seventh Circuit entered judgment in this case on October 25, 2006. A timely petition for rehearing was filed with that court, and was denied on November 13, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutory provisions, which are set out in full in the accompanying appendix, are relevant to this case: 28 U.S.C. § 158, 29 U.S.C. § 1342, and 29 U.S.C. § 1348.

STATEMENT OF THE CASE

Introduction

United filed a petition for reorganization under Chapter 11 of the federal bankruptcy law, 11 U.S.C. §§ 101-1532, in December, 2002 and emerged from bankruptcy on February 1, 2006. While in bankruptcy, United pursued a restructuring of its labor and pension costs, including two rounds of proceedings to reject its collective bargaining agreements with ALPA under 11 U.S.C. § 1113 that led to modified collective bargaining agreements. App. C, 20a-21a. United also initiated separate, related proceedings designed to eliminate its defined benefit pension funding obligations and it ultimately reached a comprehensive settlement with the PBGC for termination of all four of its defined benefit pension plans covering pilots and other classifications of employees. *See In re UAL Corp., Appeal of Ass'n of Flight Attendants*, 428 F.3d 677, 681 (7th Cir. 2005).

This petition concerns two separate, but related proceedings in the United bankruptcy case, the termination of the Pilot Plan through an action commenced by the PBGC under Title IV of ERISA, and United's efforts to cease the payment of contractually owed supplemental retirement benefits that are paid from United's general assets (rather than from the Pilot Plan's assets).[1]

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[1] Hereinafter, the "Pilot Plan" refers to the defined benefit pension plan qualified as a retirement plan under 26 U.S.C. § 401(a) and subject to the PBGC's termination authority under Title IV of ERISA. "Supplemental Benefits" refers to the monthly retirement payments that were made from United's general assets.

In the Pension Plan Termination Case, an action contested by ALPA and by URPBPA, the PBGC sought to terminate the Pilot Plan under 29 U.S.C. § 1342(c) in the midst of United's attempt to reject its collective bargaining agreements with its labor unions to eliminate its pension funding obligations. The PBGC sought to terminate the plan by showing "that the plan must be terminated in order . . . to avoid . . . any unreasonable increase in the liability of the [PBGC insurance] fund," 29 U.S.C. § 1342(c), with a date of plan termination of December 30, 2004, established under 29 U.S.C. § 1348(a)(4). The courts below granted the relief requested by the PBGC despite the fact that United and the PBGC had already reached a settlement agreement whereby the PBGC was well-compensated for agreeing to accept the liabilities of all of United's defined benefit pension plans, including the Pilot Plan. Moreover, the courts chose the December 30, 2004 termination date by applying strikingly dissimilar case law involving severely distressed plan sponsors. The Pilot Plan was terminated as of the day after the PBGC filed its involuntary termination complaint. With no warning, pilots who continued to provide services to United under their modified concessionary labor agreements would no longer earn pension accruals even for the few additional months they expected their pension plan to continue.

In the Supplemental Benefits Case, in the Fall of 2005, after the bankruptcy court issued a ruling (later vacated by Judge Darrah) terminating the Pilot Plan, United, for the second time in the bankruptcy case, attempted to discontinue the payment of the Supplemental Benefits. The bankruptcy court ruled against United because the court had already ruled (when United first sought to discontinue payment of the Supplemental Benefits) that United was required to pay the benefits "until the Pilot Plan is terminated pursuant to applicable law or the parties agree otherwise," an order United had not appealed and to which it was therefore bound. Despite that earlier unappealed ruling, the court of appeals

ruled that United could again press its objection to continuation of the payments because United was not required to appeal what the Court deemed an interlocutory ruling. In reaching its decision, the court ignored that United could have appealed the initial order as of right and instead relied on wholly inapposite, non-bankruptcy law concerning interlocutory orders in other cases.

Factual and Procedural History

On December 29, 2004, the PBGC filed suit to terminate the Pilot Plan under 29 U.S.C. § 1342(c), seeking a termination date of December 30, 2004. The termination case was referred to the bankruptcy court and in July, 2005, the PBGC moved for summary judgment. In August, the bankruptcy court issued a preliminary oral ruling that the PBGC was entitled to summary judgment regarding the proposed *date* of plan termination, but was required to prove at trial that the termination of the Pilot Plan was necessary under § 1342(c) in order to avoid an unreasonable increase in the liability of the PBGC insurance fund. The district and appeals courts subsequently affirmed this ruling. App. C, 19a-45a, App. A, 1a-17a.

At the time the PBGC brought its action to terminate the Pilot Plan, United's pilots were voting on the terms of a new collective bargaining agreement that resolved United's second motion to reject its agreement with ALPA. *See* App. C, 20a-21a. The agreement eventually ratified by the pilots (the "ALPA Agreement"), included an 11.8 percent pilot pay cut (adding to a substantial pay cut taken a few months after United entered bankruptcy) and various work rule changes. In addition, ALPA agreed to waive "any claim it may have that termination of the [Pilot] Plan would violate the terms and conditions of the existing collective bargaining agreement" and agreed to "not otherwise oppose the Company's efforts to terminate" the Pilot Plan under the ERISA distress termination provision, 29 U.S.C. § 1341(c)(2)(B)(ii). *Id.*

Under the agreement, United agreed that it would not seek to terminate, or agree to the termination of, the Pilot Plan, effective at any time before the latest effective date of the termination of any other United pension plan, a date which turned out to be June 30, 2005. The agreement provided that it was not to be construed "as any agreement of any form by [ALPA] that the [Pilot] Plan should be terminated." The agreement also provided that the Pilot Plan "shall remain in full force and effect unless . . . the Bankruptcy Court issues an order declaring that the Company has met the requirements for plan termination under" ERISA. *Id.*

From the time United filed for bankruptcy, pilots continued to receive retirement benefits. The benefits came from two sources. The benefits below the limits permitted by § 401(a) of the Internal Revenue Code for tax-qualified pension plans were paid out of the Pilot Plan pension fund trust. The payments that exceeded the § 401(a) limits, the Supplemental Benefits, were paid by United directly from its general corporate assets.

After reaching the ALPA Agreement, United sought in February 2005 to stop paying the Supplemental Benefits. In response, ALPA brought a motion to compel United to continue to make the payments, on the ground that the agreement contractually obligated United to do so. App. N, 134a. The bankruptcy court held that the contract required United to continue paying the Supplemental Benefits until the Pilot Plan terminated under applicable law. *Id.* at 136a. The bankruptcy court rejected United's argument that a possible future ruling in the Pension Plan Termination Case establishing December 30, 2004 as the Pilot Plan termination date would alter United's current contractual obligation to make the payments. *Id.* In reaching this conclusion, the bankruptcy court noted that the PBGC sought the retroactive plan termination date to define its rights with regard to qualified pension benefits only (meaning those benefits paid from the

Pilot Plan trust then subject to the PBGC's termination lawsuit). App. N, 134a. The bankruptcy court ordered that United "shall continue payment of non-qualified [Supplemental] benefits (as described in the motion) until the [Pilot Plan] is terminated pursuant to applicable law or the parties agree otherwise." App. M, 131a.[2] United did not appeal the February 18, 2005 order.

In April, 2005, while its termination lawsuit over the Pilot Plan was pending, the PBGC reached agreement with United (the "PBGC Settlement") whereby the PBGC agreed to the termination of all of United's defined benefit pension plans. *See Ass'n of Flight Attendants*, 428 F.3d at 681. As a result of the PBGC settlement, a plan covering United ground personnel was terminated effective March 11, 2005. *See PBGC v. United Airlines Inc.*, No. 05-2375, 2007 WL 57271, at *9 (4th Cir. Jan. 9, 2007). Two other plans were terminated with effective dates of June 30, 2005. *See Ass'n of Flight Attendants v. PBGC*, No. 05-1036, 2006 WL 89829, at *11 (D.D.C. Jan. 13, 2006). The Pension Plan Termination Case continued to be litigated, because the PBGC reserved its right to seek a December 30, 2004 termination date for the Pilot Plan, but with a limited range of possible dates as a result of the PBGC Settlement. The Court of Appeals for the Seventh Circuit ultimately approved the settlement. *Ass'n of Flight Attendants*, 428 F.3d 677.

At trial in the Pension Plan Termination Case in September, 2005, ALPA moved to introduce additional evidence concerning the termination date to establish that Pilot Plan participants had a continued expectation that the plan would

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[2] The bankruptcy court reasoned that under United's "carefully bargained-for" post-petition agreement with ALPA, "United committed to continue making the payments" until termination of the plan. App. N, 136a. The court stated that "until that termination actually occurs, irrespective of any retroactive effective date, the obligation to make payment of nonqualified benefits is present under the CBA." *Id.* at 135a.

continue given ALPA's position opposing a termination date of December 30, 2004. The court denied the motion. App. J, 119a-120a.

In its case, the PBGC identified four factors that would increase its liability if the plan was not terminated on December 30, 2004, but continued for six months until June, 30, 2005, the latest termination date contemplated under the PBGC Settlement. Specifically, the PBGC pointed to the effect of the statutory annual cost of living adjustment, effective January 1, 2005, in the maximum benefit that the PBGC is required by law to guarantee, established under ERISA to track changes in the Social Security wage base (the "COLA"). *See* 29 C.F.R. § 4011 Appendix B (Table of Maximum Guaranteed Benefits); *see also* 29 U.S.C. § 1322(b). The remaining factors were attributable to monthly service accruals and benefit payouts that would occur in the normal operation of the plan and other gradual changes the PBGC alleged should be counted as an unreasonable increased liability. ALPA contested the PBGC's claim that the additional liability attributable to this period constituted an "unreasonable increase" in the PBGC's liability. *See* App. C, 41a-42a.

On October 26, 2005, the bankruptcy court issued a ruling granting all of the relief sought by the PBGC. App. G, 88a. The court set the additional liability attributable to the period December 30, 2004 through June 30, 2005 at $84.2 million (less than the PBGC's calculation) and ordered the Pilot Plan terminated as of December 30, 2004. App. H, 94a.

Because the bankruptcy court's order was issued in a "non-core" proceeding, *see* 28 U.S.C. § 158(c)(1), it was not final under the statutory procedures for a review of non-core matters, and ALPA, URPBPA and the PBGC lodged objections. On June 13, 2006, the district court adopted the bankruptcy court's proposed findings and conclusions, as modified, and entered a final order terminating the Pilot Plan

effective December 30, 2004. App. B, 18a, App. C, 20a. The district court did not grant ALPA's request to accept additional evidence regarding the notice of the PBGC's intent to terminate the plan and the expectations of the pilots.

In the interim, seizing on an earlier tentative ruling announced by the bankruptcy court in the Pension Plan Termination case, United decided, again, to cease paying the Supplemental Benefits. ALPA, (joined by URPBPA) again filed a motion to compel payment and the bankruptcy court again granted the motion. App. L, 130a. The bankruptcy court noted that it was following its prior order, which United had not appealed. United did appeal this second ruling. On February 23, 2006, the district court issued a minute order, dismissing, "for lack of ripeness," United's appeal. App. K, 121a. United appealed that decision to the court of appeals. In addition, ALPA and URPBPA appealed the district court's order in the Pension Plan Termination Case.[3]

In a consolidated ruling on those appeals, the court of appeals affirmed the ruling in the Pension Plan Termination Case and reversed the order in the Supplemental Benefits Case. In reviewing the pension termination, the court concluded that the additional costs to the PBGC for continuation of the Pilot Plan for the six-month period through June 30, 2005 were "unreasonable," dismissing ALPA's attempt to compare that cost with the "total obligations of the plan (several billion dollars)," because any "number can be made to look trifling by comparing it with some much larger number." App. A, 10a. Instead of identifying what relevant comparators should be used to determine what loss would be "unreasonable," the court summarily concluded that by any "normal calculation" $84 million is "substantial." *Id.*

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[3] Even though the PBGC prevailed in the termination action, the agency filed a cross-appeal seeking affirmation of the Pension Plan Termination Order on other grounds.

The court did not address the merits of the December 30, 2004 termination date, noting only that "the district judge was not required to split the difference between the ALPA and the PBGC. That United had promised the Union not to agree to a date before June 30 does not affect either the PBGC or the court, for they are strangers to the bargain." *Id.* at 11a. The PBGC's cross-appeal was dismissed as an improper request for an advisory opinion. *Id.* at 5a.

With respect to the Supplemental Benefits Order, the court determined that United's failure to appeal the initial February, 2005 decision compelling it to continue making payments did not preclude it from appealing the Supplemental Benefits Order because the earlier order was interlocutory, and failure to appeal an interlocutory decision does not result in a forfeiture of a litigation position. *Id.* at 12a-14a. On the merits, the court ruled that United was not required to pay the Supplemental Benefits due for October, 2005 or thereafter because the termination of the Pilot Plan, which was set retroactively at December 30, 2004, necessarily terminated its obligation to pay the Supplemental Benefits.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the issues presented raise important questions of federal law that have not been, and should be, settled by this Court. In its ruling affirming the Pension Plan Termination Order, the court of appeals ignored the plain language of the involuntary termination statute, under which Congress (a) limited the PBGC's ability to terminate a pension plan and, (b) in order to protect participants where a termination is contested, placed ultimate decision-making power in the hands of the court. Even though the Pilot Plan, like other United pension plans, was terminated during United's bankruptcy case, in which the airline sought sweeping changes to its labor agreements and the elimination of its pension obligations, the additional

accruals for the six-month period the Pilot Plan could have remained in effect beyond December 30, 2004 were significant to the pilots as stakeholders competing with other United stakeholders, including the PBGC, for the limited returns available in the deeply concessionary environment of the United bankruptcy.

The courts below instead applied a loose standard that ignored the meaning of the statute and that would allow the PBGC to terminate a pension plan whenever it faces *any* additional liability if the plan continues, and as of a date that affords no meaningful notice to the plan participants. The Supreme Court should grant the writ in order to secure a workable standard that comports with the plain language of the statute.

In addition, the petition should be granted because in its ruling in the Supplemental Benefits Case, the court of appeals has created unworkable uncertainty among the courts regarding the finality of appeals in bankruptcy. In ruling that United had not forfeited its right to appeal a prior order compelling the payment of the Supplemental Benefits, the court undermined courts' and parties' ability to conclusively resolve discrete matters within a bankruptcy case that are critical to an expeditious overall completion of the case. If the court's ruling ignoring the important distinction between non-bankruptcy interim orders and orders entered in discrete proceedings in a bankruptcy case goes unreviewed, the prospects for orderly resolution of bankruptcy cases are severely weakened.

I. The Decision of the Court of Appeals That the Pilot Plan Should Be Terminated as of December 30, 2004 Misapplies the Involuntary Pension Plan Termination Provisions and Requires Review to Clarify an Important Question of Federal Law

ERISA permits the PBGC to seek the termination of a single-employer pension plan by filing an action and establishing that the plan must be terminated "in order to protect the interests of the participants or to avoid an unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the [PBGC's insurance] fund." 29 U.S.C. § 1342(c). In such a contested plan termination case, the court establishes the termination date. *See* 29 U.S.C. § 1348(a)(4). Congress thus intended that the courts adjudicate a plan termination by addressing and balancing the interests of the plan participants, the plan itself and the PBGC. *See PBGC v. Heppenstall Co.*, 633 F.2d 293, 301 (3d Cir. 1980). The provisions of Title IV of ERISA apply to approximately 28,800 single-employer plans insured by the PBGC, covering over 34 million individuals. *See http://www.pbgc.gov/media/key-resources-for-the-press/content/page13540.html* (last visited on Jan. 20, 2007). The construction of these statutory provisions therefore has enormous consequences for millions of active and retired employees and their representatives[4] and presents an important question of federal law that has not been, and should be, settled by this Court.

Congress considered the role of the Court in plan terminations to be a "substantial safeguard" of the rights of participants and beneficiaries. *See* 29 U.S.C. § 1342(a) (noting

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[4] *See* 29 U.S.C. § 1303(f)(1) (a participant or beneficiary, adversely affected by an action of the PBGC or an "employee organization representing such a participant or beneficiary" may bring an action against the PBGC for appropriate equitable relief in the appropriate court).

that the PBGC may prescribe a simplified termination procedure for smaller plans that must include "the requirement for a court decree under subsection [1342](c)"); App. C, 31a (explaining that "the judicial decree functions as a 'substantial safeguard' for the rights of parties other than PBGC affected by plan termination"). In particular, Congress did not intend plans to be terminated as of a particular date merely because the date is selected by the PBGC, as is evident both from the statutory mandate that "the court" establish the termination date under 29 U.S.C. § 1348(a)(4), as well as from the requirement that the PBGC obtain a decree from the court adjudicating the termination. 29 U.S.C. § 1342(c).

A. The Meaning of an "Unreasonable" Increase

Congress' intention that the court balance three factors in adjudicating a termination is also evident in the choice of the word "unreasonable" to limit the additional liability that could form the basis of a termination. In 1980, Congress amended § 1342(c) to reinforce its intention. As originally enacted, § 1342(c) allowed the PBGC to terminate pension plans to avoid "further" increases. ERISA, Pub. L. No. 93-406, § 4042(c), 88 Stat. 829, 1021 (1974). Congress amended the statute to change the word "further" to "unreasonable." As this Court has repeatedly explained, "a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (the courts' "task is to apply the text, not to improve upon it").

The courts below, however, failed to apply the plain meaning of the statute. In construing the standard set forth in 29 U.S.C. § 1342(c), the courts were required to conclude that continuation of the Pilot Plan beyond December 30, 2004 until June 30, 2005 unreasonably increased the liability to the

insurance fund.[5] "Unreasonable" denotes something out of the ordinary. *See, e.g., Doggett v. United States*, 505 U.S. 647, 652 (1992) (contrasting "ordinary" and "unreasonable"). In seeking to terminate the Pilot Plan as of December 30, 2004, the PBGC aimed to prove that liability increases for the period January 1 through June 30, 2005, the latest termination date under PBGC's global settlement with United, were "unreasonable" under the statute. It could only point to, however, increases from normal plan operations and from a Congressionally-mandated cost of living adjustment that took effect January 1, 2005.

Thus, the additional liability attributable to a continuation of the Pilot Plan beyond December 30, 2004 includes several components reflecting costs attributable to the passage of time between January 1 and June 30, 2005, such as normal benefit accruals due to the continued services rendered by the pilots, merely "further," rather than "unreasonable" increases. The increased liability also includes $44 million attributable to an increase in the annual COLA adjustment to the maximum government benefit, an increase in the maximum benefit that the PBGC is required to guarantee under 29 U.S.C. § 1322(b). As such, it is a cost Congress provided for as part of its complex delineation of the benefits that would be guaranteed by the pension insurance program. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice . . . ." *PBGC v. LTV Corp.*, 496 U.S. 633, 646-47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)). The COLA adjustment effective January 1, 2005 cannot be an "unreasonable" increase in the PBGC's liability where Congress has established it as an integral component of the insurance program.

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[5] Where, as here, the PBGC seeks termination solely to avoid an "unreasonable increase in the liability of the fund," that determination is tantamount to a determination of the termination date itself.

The courts below also construed the statutory standard of "reasonableness" in a virtual vacuum, divorced from any consideration of the relevant context in the case, in particular, the PBGC's settlement with United. *Cf. Samson v. California,* 126 S.Ct. 2193, 2197 (2006) (the Court examines "'the totality of the circumstances' to determine whether a search is reasonable"); *Black's Law Dictionary* 1293 (8th ed. 2004) (defining "reasonable" as "[f]air, proper, or moderate *under the circumstances*" (emphasis added)).

The court of appeals ignored this context, App. A, 9a-10a, and instead stated, without explanation, that the amount at issue here "is substantial by any normal calculation." *Id.* at 10a. Whether substantial or not, the question before the court was whether the increase was "unreasonable." The court's standard provides an unworkable framework for the PBGC, other courts, and pension plan participants or their representatives facing termination of their pension plan.

No other court of appeals has applied § 1342(c) to a contested involuntary termination case like this one.[6] If Congress' deliberate choice in crafting a termination standard is to be given effect by the courts, an application of the standard that comports with its plain meaning needs clear definition. This Court therefore should grant the writ to ensure that the plain language of the statute is given effect.

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[6] Several district courts have applied § 1342(c), and each one has also offered loose and ineffectual standards. Nonetheless, even these courts have relied on more definite contextual analysis than the Seventh Circuit did here. *See, e.g., PBGC v. The Pension Comm. of Pan Am. World Airways, Inc.*, 777 F.Supp. 1179, 1183 (S.D.N.Y. 1991) ("[a] substantial increase in such potential liability, with no certain prospect that such potential liability can be recouped, should be regarded under this statute as unreasonable"); *PBGC v. FEL Corp.*, 798 F.Supp. 239, 242 (D.N.J. 1992) (relying on evidence showing that termination was immediately necessary to ensure the PBGC's recovery, as well as because the sponsor was "technically insolvent").

B. Participants' Expectations in Continued Accruals

In addition, contrary to Congress' directive that the court "establish[]" the termination date where the parties do not agree, *see* 29 U.S.C. § 1348(a)(4), the courts below merely selected the date chosen by the PBGC. In cases like this one, courts generally select a plan termination date by "balanc[ing] the competing interests of the [PBGC] and the participants in an appropriate termination date." *Heppenstall,* 633 F.2d at 301. In *Heppenstall,* the court defined the employees' interests as an expectation in the continued accrual of benefits and concluded that participants enjoy a statutory right to the protection of those interests in a termination proceeding, including notice of such proceedings. *Id.* at 301-03. Following *Heppenstall*, courts have determined the date on which participants have received notice sufficient to extinguish their reasonable expectation in continued accrual of benefits. Once that date is determined, the court selects the date thereafter that "serves the interests of PBGC." *PBGC v. Republic Technologies Int'l, LLC*, 386 F.3d 659, 666 (6th Cir. 2004).

Under this test, courts ostensibly balance competing interests. In actuality, however, in most cases, by the time the PBGC has issued its notice of termination, any reasonable expectation of continued accruals has long since vanished. In such cases, there is in reality little need to undertake a balance of competing interests. In *RTI,* for instance, the PBGC sought a termination date in response to the company's failed efforts to reorganize, while the company was in the process of shutting down. *Id.* at 660-61. In *Heppenstall*, the plan sponsor had already ceased all operations by the time the PBGC moved to terminate the plan. *Id.* at 301. *See also PBGC v. Md. Glass Corp.*, 618 F.Supp. 1410, 1415-16 (D. Md. 1985) (PBGC chose to terminate the plan after plant production was brought to a standstill, evidenced by the

shutdown of the plant furnace); *PBGC v. Mize Co., Inc.*, 987 F.2d 1059, 1060 (4th Cir. 1993) (PBGC sought termination of plan six years after company ceased operations). In *PBGC v. Dickens*, 535 F.Supp. 922 (W.D. Mich. 1982), "the PBGC orally agreed at trial . . . [that the date the employer] totally ceased operations" was the appropriate date of termination. *Id.* at 925.[7]

Thus, although courts have generally selected the date PBGC filed its termination complaint as the date employees' expectations were extinguished, *e.g.*, *Mize*, 987 F.2d at 1060, in fact, a plant shutdown, an asset sale or other event resulting in loss of employment provides a necessary factual predicate for the cessation of the plan participants' expectation of continued pension accruals. Under those circumstances, moreover, the interest of the PBGC in establishing an early termination date is more consistent with the reduced expectations of continued employment.

The use of the PBGC notice as reflected in these liquidation cases does *not* work, however, where there is a divergence between participants' actual expectation regarding continued employment and continued pension accruals, on the one hand, and the PBGC's view of its interests in stemming its losses on the other. The United bankruptcy bore no resemblance at all to a case involving a shutdown of operations or sale of assets that would extinguish the employees' expectation in continued employment and accrual of benefits as of the date the PBGC took its preemptive action against the Pilot Plan.

United, the second largest airline in the United States, was reorganizing as an ongoing enterprise. Its intense effort to

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[7] In *Pan Am*, the court rejected the termination date proposed by the PBGC even after it provided notice. It established a termination date one week later, as of when the court determined that participants had received constructive notice. *Pan Am.*, 777 F.Supp. at 1185.

obtain labor cost concessions, pension funding relief and other cost restructuring during a period of industry-wide distress did not convey the same evidentiary predicate as the cases under which the standard was erected. The PBGC's notices appeared just as the pilots were voting to ratify a modified labor agreement with United. Communications from ALPA expressed the union's strong, negative reaction to the action taken by the PBGC, and conveyed ALPA's resolve to challenge it. App. S, 153a. Under these circumstances, the mere issuance of notices by the PBGC could not suffice to extinguish the pilots' expectations of continued accruals as of December 30, 2004.

In order to give effect to the competing interests involved, courts must balance them under 29 U.S.C. § 1348(a)(4) in establishing a termination date, a balancing test that is essentially fact intensive. Whether notice is adequate is fundamentally an issue of fact that depends on the circumstances. *See, e.g., Jones v. Flowers,* 126 S.Ct. 1708, 1714 (2006) ("we have explained that the 'notice required will vary with circumstances and conditions'" (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956)); *Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997). Because the circumstances here demanded more than merely applying the two-part test developed under § 1348(a)(4) as a matter of law, ALPA sought, unsuccessfully, the right to submit evidence in the bankruptcy court on the matter, App. J, 119a-120a, and again as part of its objections to the bankruptcy court's proposed finding of fact under 28 U.S.C. § 157(c). The courts below not only erred in denying ALPA the right to submit evidence, but more fundamentally failed to apply the statutory termination test as adopted by Congress.

The writ should be granted so that courts will apply these rules regarding the determination of adequate notice of a plan termination in the manner Congress intended.

II. The Decision of the Court of Appeals That United Had Not Forfeited Its Appeal Rights In Challenging Its Obligation to Pay Supplemental Benefits Deepens an Already Confusing Divide in Case Law Regarding Appeals in Bankruptcy Cases and Presents an Issue of Compelling Importance Warranting This Court's Review

A. The Ruling Below was Contrary to Well-Established Precedent

In February, 2005, the bankruptcy court ordered United to pay the Supplemental Benefits until the Pilot Plan was terminated under the provisions of Title IV of ERISA. *See* App. M, 131a-132a. United did not appeal that order but initially complied, and then decided not to make the Supplemental Benefits due in October, 2005, before the court terminated the Pilot Plan.

In later ruling that United was not obligated to pay the Supplemental Benefits, the court of appeals rejected the appellees' argument that United had forfeited its right to contest the October payment by failing to appeal the February, 2005 order. The court rejected the forfeiture argument based solely on its conclusion, nowhere analyzed in the decision, that an appeal from the bankruptcy court's February, 2005 order would have been interlocutory, citing, among other rulings, this Court's decision in *United States v. Clark*, 445 U.S. 23, 25 n.2 (1980). *See* App. A, 12a-14a. Neither *Clark* nor the court's other citations, however, involved bankruptcy appeals. The court simply presumed that the February, 2005 ruling was interlocutory and that if United "was willing to . . . let the subject slide until October [2005], that was its own loss (and the retirees' gain); a legal ruling declaring the legal position lost forever would lead prudent lawyers to file appeals early and often, pouring molasses on the judicial process." *Id.* at 13a-14a.

The court's ruling, however, ignored long standing case law, including court of appeals precedent, that discrete disputes within a bankruptcy case are separate judicial units and that orders resolving these disputes on the merits are final orders for appeal purposes.[8] *See generally, In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983) (Breyer, J.); 1 *Collier on Bankruptcy* (15th ed. rev.), ¶ 5.07[1][b] (noting that "each adversary proceeding or contested matter is a discrete unit [within the larger bankruptcy case] and that, once that unit is defined, ordinary concepts of finality apply"),[9] John P. Hennigan, Jr., *Towards Regularizing Appealability in Bankruptcy*, 12 Bankr. Dev. J. 583, 599-602 (1996) (hereafter "Hennigan") (describing legislative history of bankruptcy appeals provisions).

The test for determining a final order in a bankruptcy proceeding is that the order "must completely resolve all issues pertaining to the disputed claim, including issues as to proper relief." *In re Integrated Res. Inc.*, 3 F.3d 49, 53 (2d Cir. 1993). *See also Saco Local Dev. Corp.*, 711 F.2d at 444 (for an order to be immediately appealable as a final order it "must finally dispose" of a discrete dispute within the bankruptcy case).

Thus, a bankruptcy court order is final for purposes of appeal when it resolves on the merits a discrete dispute within the larger bankruptcy case. *See Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 126 S.Ct. 2105, 2110 n.3 (2006); *Bank of Am., N.A., v. Moglia*, 330 F.3d 942, 944 (7th Cir. 2003); *In*

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[8] The district court has jurisdiction to hear appeals from "final judgments, orders and decrees" of the bankruptcy court. 28 U.S.C. § 158(a)(1).

[9] Historically, the bankruptcy laws have recognized a "proceeding" in a bankruptcy as an "individual 'matter [] of an administrative character . . . presented *in the ordinary course* of the administration of the bankrupt's estate'" (alterations in original) (emphasis in original). *Saco Local Dev.*, 711 F.2d at 444-45 (citing *Taylor v. Voss*, 271 U.S. 176, 181 (1926)).

re Taylor, 913 F.2d 102, 104 (3d Cir. 1990) (order "fully and finally resolved a discrete set of issues" and was therefore appealable). *See also In re Urban Broadcasting Corp.*, 401 F.3d 236, 247 (4th Cir. 2005) (order not final where it did not conclusively determine a separable dispute); *In re Golant*, 239 F.3d 931, 934 (7th Cir. 2001) (in bankruptcy proceedings, "[w]here an order terminates a discrete dispute that, but for the bankruptcy would be a stand-alone suit . . . the order will be considered final and appealable"); *In re James Wilson Assoc.*, 965 F.2d 160, 166 (7th Cir. 1992); *In re Greene County Hosp.*, 835 F.2d 589, 594 (5th Cir. 1988) (for appeal purposes, final order includes "an order that conclusively determines a separable dispute"); *In re Fox*, 241 B.R. 224, 228 (10th Cir. B.A.P. 1999) (order not appealable as a final order unless it "conclusively determines 'discrete disputes' within the larger case").

By contrast, an interlocutory order in bankruptcy, which is immediately appealable only if certain conditions are met, *see* 28 U.S.C. § 158(a)(2), (3), is either one which does not reach the merits, or which reaches the merits but "is not the end of the road for the losing party." 1 *Collier on Bankruptcy* at ¶ 5.07[5]. *See also id.* (listing orders courts have found to be interlocutory).

ALPA and URPBPA brought their motions in February, 2005 to compel payment of the Supplemental Benefits as "contested matters" in the main United bankruptcy case and the court entered its ruling in the main bankruptcy case. *See* Fed. R. Bank. Proc. 9014(a) (contested matter is initiated by motion). Movants did not bring the motion as part of the Pension Plan Termination Case then pending in the bankruptcy court as a separate adversary proceeding, another form of discrete judicial unit from which the parties took appeals.[10]

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[10] An adversary proceeding resembles a non-bankruptcy civil action and is initiated through the filing of a complaint. The applicable

The bankruptcy court's February, 2005 order clearly satisfied the standard for a final order that has been applied in bankruptcy cases. The order not only resolved the controversy on the merits, but, by requiring United to continue the payments, also necessarily determined that, under the terms of the post-petition agreement between ALPA and United, United was required to pay the claimed amounts in full and to pay them when they came due. App. A, 16a (noting that payment provided retired pilots with "100¢ on the dollar").[11] The February, 2005 order was akin to orders considered final and appealable in other discrete proceedings resolving disputes regarding claims in bankruptcy. *E.g.*, *In re Kids Creek Partners, L.P.*, 200 F.3d 1070, 1073 (7th Cir. 2000) (priority of claim for administrative costs and fees); *In re Fowler*, 394 F.3d 1208 (9th Cir. 2005) (priority of tax claim); *In re Miller*, 284 B.R. 734 (10th Cir. B.A.P. 2002) (priority of claim for child and spousal support). *See also In re UAL Corp.*, 411 F.3d 818, 821 (7th Cir. 2005).

Because the February, 2005 order was final in the context of the bankruptcy case, United's failure to appeal should have resulted in a forfeiture of its right to argue in October, 2005 that it was no longer obligated to make these payments. *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202-03 (1988) (noting "jurisdictional consequences of untimely appeal"); *In re Kids Creek Partners, L.P.*, 200 F.3d at 1073 (if an order "was a final decision, appealable to the district court under 28 U.S.C. § 158(a), then failure to take a timely appeal puts that order beyond review," and "all claims that

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bankruptcy procedural rules track the Federal Rules of Civil Procedure. *See* Part VII, Fed. R. Bankr. Proc.

[11] The bankruptcy court fully addressed the parties' dispute and ruled that the payment priority of the Supplemental Benefits under bankruptcy law did not need to be decided because the post-petition agreement between United and ALPA required that United continue the payments regardless of the priority. App. N, 135a-136a.

could have been raised at that time were forfeited"). *See also In re Gould*, 977 F.2d 1038, 1040 (7th Cir. 1992) (party may not "challenge the efficacy" of a bankruptcy court's final order if it never appealed the order). Accordingly, as of October, 2005, United should have been bound by the February, 2005 order requiring it to continue paying the Supplemental Benefits. *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) ("a ruling by the trial court, in an earlier stage of the case, that could have been but was not challenged on appeal is binding in subsequent stages of the case").

Instead, without discussion, and contrary to long-established bankruptcy practice, the court of appeals treated the February, 2005 order as interlocutory, as if it were not entered in a bankruptcy case and, as such, ruled that United had not waived its right to challenge the bankruptcy court's ruling later on. By failing to address the prior order in bankruptcy terms, the court of appeals' ruling resembled the discredited notion that the final order in a bankruptcy case is the order entered at the end of the entire bankruptcy case. This ruling will create new havoc in the administration of a bankruptcy case. *See Becton Dickinson*, 486 U.S. at 201 (considerations of finality "are not abstractions" but pertain to "the smooth functioning of our judicial system").

B. The Court's Approach Introduces New Uncertainty into the Administration of Bankruptcy

The courts have long considered the approach of the court below unworkable because it is at odds with the peculiar needs of a bankruptcy case, in which discrete matters must be resolved along the way in order to reach an overall resolution of the case. *E.g., In re Christian*, 804 F.2d 46, 48 (3d Cir. 1986) (awaiting outcome of entire case before appeal can be heard is neither "desirable or practical"); *In re Martin Bros. Toolmakers, Inc.*, 796 F.2d 1435, 1437 (11th Cir. 1986)

(finality "cannot be limited to the last order concluding the bankruptcy case"). The Court's ruling thus undermines the ability to resolve the myriad individual matters that must be addressed in order to complete the resolution of a bankruptcy case.

Courts have long recognized that the concept of finality in bankruptcy appeals is "considerably more flexible" than in ordinary civil litigation because resolution of the larger bankruptcy case necessarily depends on the prior, authoritative disposition of the many subsidiary disputes that arise during the case in the form of separate proceedings. *See In re Gould*, 977 F.2d at 1041; *In re Martin Bros. Toolmakers, Inc.*, 796 F.2d at 1437 (flexible approach to appeals is "vital" in bankruptcy, since each "claim represents a variable which must be quantified before . . . a workable reorganization plan [is] adopted"). The resolution of a bankruptcy case has been aptly described as "assembling a jigsaw puzzle. It is necessary to start by putting some of the pieces firmly in place." Hennigan, 12 Bank. Dev. J. at 601.

Like the jigsaw puzzle, a bankruptcy case is resolved by conclusively securing the various pieces that will eventually comprise the whole. Clear rules regarding when individual disputes must be appealed, and therefore forfeited if not timely appealed, are a necessary prerequisite to concluding a bankruptcy case in which numerous parties, claims, and transactions must be addressed before a debtor can propose a reorganization plan and determine how creditors will be paid. *See Martin Bros. Toolmakers, Inc.*, 796 F.2d at 1437 (reorganization cases "proceed most smoothly when at least some variables become fixed and operate as the basis for further negotiation"). Adherence to the forfeiture rule, which is "black letter law" regarding non-appealed final orders, *see* Hennigan, 12 Bank. Dev. J. at 585, aids the overall resolution of bankruptcy cases by forcing parties to address substantive disputes at the time they are decided.

Courts and commentators have noted that the subject of finality in bankruptcy cases is "complex," *In re Huebner*, 986 F.2d 1222, 1223 (8th Cir. 1993), "murky," *Khan & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1354 (7th Cir. 1990) and greatly in need of systemic, organizing rules. Hennigan, 12 Bankr. Dev. J. at 622-26 (suggesting that courts regularize their approach following the principles developed under 28 U.S.C. § 1291). The ruling below, by permitting a debtor to preserve the ability to challenge a substantive ruling for an indeterminate time period, fosters uncertainty and prolongs—rather than foreshortens—the resolution of individual disputes that must be accomplished for complete resolution of a bankruptcy case. This ruling opens a new ground for confusion in an already complicated maze of case law that would benefit from decisive guidance by this Court. If left to stand, the ruling below by an influential court of appeals will leave bankruptcy litigants in a state of perpetual uncertainty regarding the finality of unappealed rulings made during the course of the case.

This Court should grant the writ in order to clarify the rules establishing final orders and application of the forfeiture doctrine in bankruptcy.

CONCLUSION

For the foregoing reasons the writ should be granted.

Respectfully Submitted,

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January 23, 2007